



REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Not reportable

CASE NO: J 1232/06

In the matter between:

CITY OF JOHANNESBURG

METROPOLITAN MUNICIPALITY

First Applicant

EKURHULENI METROPOLITAN

MUNICIPALITY

Second Applicant

THE SOUTH AFRICAN LOCAL GOVERNMENT

ASSOCIATION

Third Applicant

BUFFALO CITY MUNICIPALITY

Fourth Applicant

CITY OF CAPE TOWN

METROPOLITAN MUNICIPALITY

Fifth Applicant

and

INDEPENDENT MUNICIPAL AND

ALLIED TRADE UNION

First Respondent

THE SOUTH AFRICAN MUNICIPAL

WORKERS UNION

Second Respondent

THE SOUTH AFRICAN LOCAL

GOVERNMENT BARGAINING COUNCIL

Third Respondent

Heard: 5 February 2013

Judgment delivered: 12 April 2013

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application in which the applicants seek *inter alia* an order declaring that an agreement entered into between the first respondent (IMATU) and the fourth applicant (SALGA) is not binding on any of the applicants and that an arbitration award issued under the auspices of the third respondent (the bargaining council) on 22 February 2006 in which the agreement was made an arbitration award, is similarly not binding. SALGA is an employers' organisation, representing some 284 municipalities, including the first to third applicants. IMATU is a registered trade union having members employed in the municipal sector.

Material facts

- [2] The material facts are not in dispute, and are recorded in the papers filed in these proceedings. For present purposes, it is sufficient to note that in July 2005, IMATU and the second respondent (SAMWU) referred a dispute between them and SALGA to the bargaining council for conciliation. The dispute concerned the manner in which fixed term contracts were regulated by SALGA's members. The conciliation failed and the dispute was referred to

arbitration. IMATU filed its statement of case on 22 September 2005. The arbitration was initially scheduled for 1 November 2005, but postponed at SALGA's request to 25 November 2005. On 16 November 2005, SALGA filed its statement of defence. A pre-arbitration meeting was held in Pretoria on 18 November 2005. On 21 November, SAMWU stated that it did not intend to participate in the arbitration and would abide the outcome. A pre-arbitration minute was signed on 25 November 2005 and the arbitration postponed to 8 December 2005. On 8 December 2005, various *in limine* issues were argued before the arbitrator. On 28 December, the arbitrator issued a ruling in respect of these issues, and the arbitration was rescheduled for 18 January 2006.

- [3] On 11 January 2006, SALGA officials Dlamini, Van Zyl and Mothuloe met with what are described as SALGA's 'main members'. The members were informed of the arbitrator's ruling, and a possible settlement of the dispute was discussed. On 13 January 2006, a further pre-arbitration conference was held at which SALGA indicated its desire to settle the dispute. Correspondence passed between the parties on 16 and 17 January, but on 18 January, the arbitration proceeded as scheduled in the absence of agreement on two 'practical issues' that separated the parties. Evidence was led at the hearing, which was postponed to 8 February 2006 to enable SALGA to obtain instructions and for the parties to further explore the prospect of settlement. A meeting was held on 26 January when the prospect of settlement was discussed. This meeting culminated in a draft agreement, circulated on 6 February. After a further meeting on 8 February, the arbitration was reconvened on 10 February 2006. The arbitrator was advised that the parties were close to settlement, but that SALGA required more time to finalise the settlement. On this basis, the proceedings were again postponed, to 22 February. Prior to that date, settlement was discussed extensively between the parties.
- [4] On 21 February 2006, Dlamini and IMATU's deputy general secretary Koen signed the settlement agreement. It was a term of the agreement that it would be made an arbitration award. On 22 February 2006, on the resumption of the arbitration hearing and at the request of the parties, the settlement agreement

was made an arbitration award. On 6 March 2006, IMATU applied to the CCMA to certify the award. The award was certified on 8 June 2006.

- [5] On 6 July 2006, the newly appointed executive director : human resources and labour relations of SALGA, Adv. Yawa, addressed a letter *inter alia* to the first to third applicants enquiring from them whether they agreed with 'an approach that seeks to nullify the settlement agreement'. On 1 August 2006, the present application was launched, which, as I have indicated, seeks to have the settlement agreement and the arbitration award set aside.

The application

- [6] The applicants contend that SALGA had no authority to represent the first to third applicants in the arbitration hearing and in the conclusion of the settlement agreement. Further, they contend that the settlement agreement is *ultra vires* the powers of SALGA, and that Dlamini (who at the time was the acting director: human resources and labour relations) was not authorised by SALGA to conclude the settlement agreement. Finally, the applicants contend that the settlement agreement contains inchoate terms and that it was in any event subject to an unfulfilled suspensive condition and that it should be set aside on that basis.
- [7] IMATU raised a number of points *in limine* on the papers and at the hearing of the application, persisted with two of them. The first is that the first to third applicants do not have *locus standi* to contest the validity of the settlement agreement concluded by SALGA; the second is that there was an unreasonable delay in the launching of the application.
- [8] I deal first with the question of delay. As I have noted, the settlement agreement was concluded on 21 February 2006, and the present application launched on 1 August 2006, some 22 weeks later.
- [9] It is well-established that where no time limit is expressly stipulated, an application (such as the present) must be brought within a reasonable time.

Given the nature of the present application, the closest analogous period in the LRA is the six-week period within which an application for the review of an arbitration award in terms of s 145 of the Act must be filed. (The present application has the effect of reviewing and setting aside a settlement agreement that was made an arbitration award). The applicants failed to file the application within that period and in response to the challenge by IMATU in the answering affidavit filed on its behalf, sought to explain the reasons for the delay.

- [10] The explanation for the delay in filing the application is proffered in the replying affidavit, where the deponent (Lebelo, on behalf on the first to third applicants) states that he 'cannot recall precisely' when the arbitration award was received, but that it was 'certainly before 23 March 2006' the date on which the first applicant's mayoral committee was informed of the decision. Between then and 5 May 2006, the date on which the first applicant instructed its own attorneys to contest the validity of the settlement agreement, meetings and discussion occurred between the first applicant and SALGA. Counsel was consulted on 15 May, and memoranda were produced on 12 and 26 June 2006. A further delay was occasioned by the second applicant's decision to join the proceedings, and by similar decision taken by the third and fourth applicants.
- [11] The test to be applied is that established by the Labour Appeal Court in *Queenstown Fuel Distributors CC v Labuschagne NO & others* [2000] 1 BLLR 45 (LAC) where Conradie JA held that in the case of the late filing of a s 145 application, the "*excuse for non-compliance **would have to be compelling**, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand*" (at paragraph [24], own emphasis).
- [12] The explanation tendered by the applicants amounts to this - it took more than a month and half to instruct attorneys, and then a further two and half months to produce the application. The explanations tendered by Spalding on behalf

of the second applicant and Van der Merwe on behalf of the third applicant add nothing to what is a woefully inadequate explanation for the delay in filing the present application. Dr Khoza, who filed an affidavit on behalf of SALGA, does not even deal with the point.

- [13] The delay in filing the present application cannot be viewed in isolation – it must necessarily be viewed in the context of the applicants' conduct in relation to the prosecution of these proceedings as a whole. The events that form the basis of the application occurred more than seven years ago. The settlement agreement and the award that are specifically the subject of the relief sought in these proceedings similarly have their origin in events that occurred more than seven years ago. The present proceedings were filed more than six and a half years ago, and the matter has been ripe for hearing at least since the granting of an application to join the fifth respondent in May 2008. The application was set down on the opposed motion roll on various occasions between 2008 and 2010, but never proceeded with. At some point thereafter the file was endorsed "No action - file closed/archived". The matter appears to have been resurrected (for reasons that are not apparent) when it was set down on the opposed motion roll on 29 December 2012 when it was postponed to the date of the hearing, 5 February 2013.
- [14] The insufficient and unacceptable (let alone compelling) reasons for the delay in filing the application aside, the applicants have been less than diligent in pursuing these proceedings. As *dominus litis*, they primarily bear the burden of ensuring that the statutory objective of expeditious dispute resolution is met, and in particular, that the proceedings be conducted with due diligence. This court has more than once been reproached by the Supreme Court of Appeal and the Constitutional Court for systemic delays in the adjudication of labour disputes. While this court must accept the blame and the responsibility to effect improvements where required, it is incumbent on parties who litigate in this court to ensure themselves that applications and actions are timeously filed, that proceedings are conducted in accordance with the time limits established by the Rules and that they exercise due diligence in securing dates for the hearing of their matters. It is not inappropriate to suggest, as the

Judge President recently has, that matters in the nature of a review by definition have attached to them a degree of urgency, and that they should be regarded as such by the parties.

- [15] In the present matter, the applicants in effect seek to have a settlement agreement and arbitration award issued more than seven years ago set aside in circumstances where there is no satisfactory explanation for the delay in filing the application, and where they have since litigated at their leisure. In my view, this is a matter where the court ought to exercise its inherent powers in relation to control of its procedure and the conduct of matters before it and refuse to entertain the application on the basis of a failure to prosecute the application with due diligence. In my view, it is not in the interests of justice to at this late stage to reopen for examination either the settlement agreement that brought a dispute referred to conciliation in July 2005 to an amicable conclusion, or the binding and certified arbitration award that gave statutory recognition and enforceability to that agreement. For that reason, the application stands to be dismissed.
- [16] If I have been unduly querulous in coming to this conclusion, in any event, the application stands to be dismissed on what has been termed the “SALGA representation’ point. In essence, the applicants contend that while members of SALGA have conferred authority on SALGA to act as their collective bargaining representative, they did not mandate SALGA to act as a representative in disputes of right in which its members are involved and in particular, that SALGA had no authority to represent the municipalities in the arbitration hearing or the conclusion of the settlement agreement.
- [17] It is well-established that a trade union or employers’ organisation is entitled to act of its own accord during the course of litigation and settlement and that it may take a decision without obtaining an express and individual mandate from its members (see *Amalgamated Engineering union v Minister of Labour* 1949 (4) SA 908 (A), *Blyvooruitzicht Gold Mining Co Ltd v Pretorius* [2000] 7 BLLR 751 (LAC)). In the latter case, it was firmly established that a union (and it follows) and employers’ organisation does not derive its authority as agent,

its obligations (and authority) are derived from principles of representative governance. This entitles a union and an employers' organization to decide how best to act in the interests of its members, without any mandate from its members, and to conclude agreements accordingly. In the present instance, a rights dispute subject to arbitration was settled. The dispute had been declared against SALGA, the decision to settle was taken by SALGA, and SALGA signed the settlement agreement. While not all of SALGA's members were happy with the decision (as evidenced by the present proceedings) their unhappiness is not a basis on which to set aside the agreement.

[18] In relation to costs, s 162 of the Act confers a broad discretion on the court to make orders for costs according to the requirements of the law and fairness. The court has generally been reluctant to make orders for costs in circumstances where an on-going collective bargaining relationship exists. This is such a case, and I see no reason to depart from the convention.

I make the following order:

1. The application is dismissed.

André van Niekerk
Judge of the Labour Court

Appearances

For the Applicant:

Second and Third Applicants: Adv. AIS Redding SC, with him Adv. MA Wesley, instructed by Bowman Gilfillan.

Fifth Applicant: Adv. AIS Redding SC, with him Adv. Fourie, instructed by Wesley Pretorius and Associates

For the Respondent: Adv. H van der Riet SC, instructed by Francois du Plessis Attorneys

Labour Court